

September 2017

# POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

**Welcome to Point of Sale**, Benesch's newest newsletter from our Retail, Hospitality & Consumer Products Industry Group. Our Group has firsthand knowledge of the retail, hospitality and consumer products industries, and has deep experience working with a wide variety of industry leaders. Our clients range from large department stores to specialty product chains, to online retailers, hotel and hospitality companies, franchise systems, quick-service restaurants, as well as consumer products manufacturers and other retailers.

#### We provide the following services to clients in these industries:

- Advertising and Promotions
- Antitrust
- Corporate Finance and Secured Transactions
- Creditors' Rights & Bankruptcy
- Data Privacy and Security Counseling, Including Breach Response
- Direct Marketing Counseling (advice on structuring compelling and legally compliant direct marketing campaigns as well as on the collection, use, storage and sharing of consumers' personal information)
- E-Commerce
- Employee Benefits
- Factoring and Financing
- Franchise Protection
- Import, Export and Customs Matters
- Intellectual Property
- Joint Ventures and other Strategic Business Relationships, Transactions and Alliances
- Labor and Employment Advice and Litigation (including ADA Title III disability/access and traditional labor/union)
- Land Use
- Licensing and Distribution
- Litigation and Dispute Resolution (Including Class Action Defense)
- Merchandising
- Mergers and Acquisitions
- Private Equity
- Real Estate Development and Leasing
- Stock and Equity transactions
- Tax
- Transportation and Logistics



**Benesch is proud to be a sponsor of the 2017 RILA Conference October 10-12 Chicago**

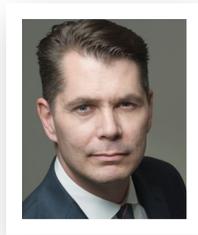
Please click [here](#) for more information and to register!



Benesch will be hosting a private dinner in connection with the RILA Conference on **October 9 at 6:00 p.m.** at **Cindy's Rooftop Restaurant** at the Chicago Athletic Association Hotel.

To join us, please contact **JULIE GURNEY** at [jgurney@beneschlaw.com](mailto:jgurney@beneschlaw.com) or 216-363-4438.

## Bittersweet: The Chicago Sweetened Beverage Tax Sparks Class Action Litigation



David S. Almeida



Courtney C. Booth



Mark S. Eisen

After a protracted legal fight, Cook County's much maligned Sweetened Beverage Tax went into effect on August 2, 2017. See County of Cook, § 74-850, et seq.<sup>1</sup> In relevant part, the tax requires retailers of sweetened beverages to tax \$.01 per ounce of sweetened beverage. For bottled beverages, calculating the tax is fairly straightforward (though, as noted below, putative class action lawsuits over the taxation of bottled water have been filed against companies like PepsiCo and Walgreens). For fountain drinks—which have caused the biggest litigation headache—the tax is calculated by the number of ounces the cup can hold.

A sweetened beverage is defined as any non-alcoholic beverage that includes sucrose, fructose, glucose and/or sugars, as well as the gamut of artificial sweeteners (i.e., aspartame and saccharin). In essence, the tax impacts all non-alcoholic beverages with the exception of water, unsweetened tea, unsweetened coffee and the like. The tax does not impact beverages to which a consumer can separately add sweetener or request that the retailer add sweetener (i.e., coffee).

Despite the nascent nature of the tax, class action lawsuits regarding the soda tax have already arrived. The fundamental premise underlying these cases is that the retailer is miscalculating or improperly imposing the tax, forcing consumers to overpay or to pay a tax when they should not. It does not matter that the tax is simply remitted to the County or State; the consumer (plaintiff) is purportedly damaged in the amount overtaxed.

The first theory—which has been utilized to sue companies like Albertson's, McDonald's and Circle K—stems from the alleged improper calculation of the tax. For example, lawsuits have been filed against McDonald's and Circle K alleging that the Sweetened Beverage Tax was

included in the taxable subtotal, meaning that consumers would pay sales tax on the Soda Tax constituting effectively a double-tax. A lawsuit was also filed against Albertson's for charging the Sweetened Beverage Tax on consumers using the federal Supplemental Nutrition Assistance Program ("SNAP"), which is exempt under the ordinance.

The second theory—which has been used in lawsuits against Subway and PepsiCo—stems from charging the tax on unsweetened beverages. The case being pursued against Subway (which is particularly troubling for QSR's) involves charging the tax on fountain drinks where the consumers pay for a cup and have the option to serve themselves an unsweetened beverage (i.e., unsweetened tea). The case against PepsiCo involves the taxing of bottled drinks at vending machines, which charge the tax regardless of whether a soda or water is purchased.

While it is simply enough to avoid taxing bottled water, it is crucial for QSR's to be cognizant of how the tax is being charged on fountain drinks where consumers can serve themselves an unsweetened beverage. If the tax is charged as a matter of course on all fountain drinks along with the purchase of a cup before the consumer selects a drink, there is risk that consumers looking to file a lawsuit will intentionally use the cup for unsweetened drinks, even water.

In light of these opportunistic lawsuits (plaintiffs' lawyers and their most litigious clients are unquestionably going restaurant to restaurant looking for claims), it is crucial to ensure that the tax is not being included within the taxable subtotal or being charged on unsweetened beverages or water. Further, as it pertains to fountain drinks, rather than re-design fountain machines or restructure their placement, we would recommend simply asking consumers

what kind of drink they want before charging the tax. While this is not full-proof, having this policy in place will greatly curtail if not prevent a class action lawsuit. Further, redesigning or restructuring is likely unnecessary in light of the fact that the Illinois state legislature is presently working to repeal the tax and prevent the imposition of any similar taxes.

Finally, while these cases are obviously a concern and come with attendant costs, it is important to keep in mind that we are talking about cents; these are low-dollar cases that are brought in hopes of a cost-of-defense settlement. Further, they are going to be difficult for plaintiffs to prevail upon on a class basis, as numerous obstacles stand in the way of a plaintiff succeeding at the class certification level, including ascertainability, commonality, adequacy and predominance. By way of example, plaintiffs' lawyers will face an uphill battle when trying to identify which individuals purchased a fountain drink only to later fill it with an unsweetened beverage, as receipts do not identify the type of drink obtained. Additionally, because many class representatives may have intentionally chosen an unsweetened beverage in order to bring a lawsuit, issues of whether they have the same interests as the class members abound.

### For more information

We will continue to monitor the developments in both the legislation and case law. Should you have any questions, please contact **DAVID S. ALMEIDA** at [dalmeida@beneschlaw.com](mailto:dalmeida@beneschlaw.com) or 312.212.4954 to discuss compliance measures.

<sup>1</sup> More information regarding the tax, as well as links to the ordinance itself, can be found here: [www.cookcountyil.gov/content/frequently-asked-questions-faqs](http://www.cookcountyil.gov/content/frequently-asked-questions-faqs).

# Class Action ALERT

Dozens of class action lawsuits have been filed over the last few months stemming from point of sale ("POS") system software upgrades for the chip and pin transition. All types of consumer-facing companies, including numerous retail and hospitality companies, have been sued under the Fair and Accurate Credit Transactions Act ("FACTA"), which requires that debit and credit card receipts be redacted to mask all but the last five digits of the card number and the card's expiration date. FACTA contains a private right of action for up to \$1,000 per receipt, even without actual injury.

As FACTA has been the law since 2006 (and amended in 2008), most companies' POS systems printed FACTA-compliant receipts. However, as a result of the October 1, 2015 EMV conversion date in the U.S., many recent POS upgrades have accidentally reverted certain settings to begin printing receipts bearing the first six digits of the credit card receipt and/or the card's expiration date. It is crucial to print a test receipt after any updates or upgrades to your POS software as well as to periodically audit your receipts and other privacy practices.

## Recent Wins for Retail, Hospitality & Consumer Product Clients

### **Hillen v. Blistex, No. 17-cv-2074, 2017 WL 2868997 (N.D. Ill. July 5, 2017).**

Plaintiff brought a putative class action against Benesch client, Blistex, alleging that its Medicated Lip Ointment tube was deceptive insofar as the entirety of the tube's contents was not usable without cutting open the tube. Plaintiff alleged on behalf of herself and all similarly situated purchasers that the Medicated Lip Ointment was a violation of the Illinois Consumer Fraud Act, common law fraud and unjust enrichment. Benesch attorneys moved to dismiss on the grounds that the alleged conduct was not unfair or deceptive as a matter of law. The Court agreed and dismissed all the claims with prejudice.

### **ARcare, Inc. v. Centor U.S. Holdings, Inc., —F. Supp. 3d—, 2017 WL 3621809 (N.D. Ohio July 18, 2017).**

Plaintiff brought a putative class action against Benesch client, Centor, alleging that it sent unsolicited faxes advertising its products in violation of the Telephone Consumer Protection Act. We were able to convince the Court that

the complaint contained insufficient factual allegations as to whether Centor played any role whatsoever in sending the faxes at issue. The Court dismissed the case.

### **Gould v. Ideal Concepts, Inc., No. 17-cv-04852, DE 19 (N.D. Ill. Aug. 16, 2017).**

Plaintiff brought a putative class action alleging that Benesch client, Ideal Concepts, placed calls in violation of the Telephone Consumer Protection Act. Recognizing that Illinois has a growing body of pro-plaintiff TCPA precedent, we moved to dismiss the case for lack of personal jurisdiction and, in the alternative, to transfer the case to the Eastern District of Pennsylvania. The Eastern District of Pennsylvania is not only where Ideal Concepts is based, but is a significantly more conservative jurisdiction with far better TCPA precedent. The Court granted our motion, despite a close question of constitutional law, and dismissed the case with instructions to the clerk to send the case to the Eastern District of Pennsylvania.

## IN THE MEDIA

### **Benesch's Retail Hospitality & Consumer Products Group**

**DAVID ALMEIDA** and **MARK EISEN** publish "[Northern District of Illinois is Botching TCPA Fax Rule](#)" in *Law360*.

**DAVID ALMEIDA** quoted in "[Spokeo Ruling Deals Blows to Cos. But May Have Silver Lining](#)" in *Law360*.

*As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.*

UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (i) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.

**For more information, please contact**

**DAVID S. ALMEIDA**

Partner and Chair, Retail, Hospitality & Consumer Products Practice Group  
312.212.4954 | [dalmeida@beneschlaw.com](mailto:dalmeida@beneschlaw.com)